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Bruce Collins
Vice President and General Counsel

October 13, 1998

BY HAND DELIVERY
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Comments on Digital Must Carry; CS Docket 98-120

To Whom It May Concern:

Enclosed are one original and 9 copies of the comments of the C-SPAN Networks submitted to the above-referenced docket as required by Sec. 1.429 of the Commission's rules.

If you have any question about these comments please contact me at (202) 626-7950.

Sincerely,

Bruce D. Collins

Enclosures

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DIGITAL MUST CARRY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Carriage of the Transmissions	)	
of Digital Television Broadcast Stations	)	
	)	CS Docket No. 98-120
Amendments to Part 76 of the	)	
Commission's Rules	)	
	)	

COMMENTS of the C-SPAN NETWORKS
(National Cable Satellite Corporation)

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October 13, 1998

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(National Cable Satellite Corporation)

I. INTRODUCTION AND SUMMARY

A. Opposition to Digital Must Carry. The C-SPAN Networks file these comments to vigorously oppose any form of a so called digital must carry rule that would be imposed on cable system operators.[1] Such a rule would be so broadly harmful to the public interest, to consumers, and to operators and programmers as to be plainly unfair, unconstitutional and even un-American.

B. Public Affairs Programmer. The C-SPAN Networks are full time satellite delivered public affairs television programming services available primarily via cable television, and devoted entirely to information and public affairs, including the live gavel-to-

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[1] These Comments are filed in response to the Commission's *Notice of Proposed Rulemaking* in the above-referenced docket, FCC 98-153, Released July 10, 1998 (hereafter, *Notice*).

gavel coverage of the proceedings of the U.S. House of Representatives (on C-SPAN), the U.S. Senate (on C-SPAN2) and a variety of other events at public fora around the country and the world.[2] The C-SPAN Networks also include C-SPAN Extra, a daytime programming service launched in September of 1997 providing coverage of public events on a live basis.[3] The C-SPAN Networks are produced and distributed by the National Cable Satellite Corporation ("NCSC"), a non-profit educational corporation in the District of Columbia corporation. NCSC is exempt from federal income tax pursuant to I.R.C. Sec. 501(c)(3).

B. History of Opposition to Must Carry. Our Comments in this proceeding represent only the most recent public expression of our longstanding and fundamental opposition to the must carry rule in all its forms. As the 1992 Cable Act was being drafted in 1991, NCSC Chairman and CEO Brian P. Lamb testified to the House Subcommittee on Telecommunications and Finance that "[i]f the must carry provisions are passed, you will make C-SPAN a second class citizen and we will be hurt by it."[4] When the must carry rule nevertheless became law we told the Commission that it "clearly violate[s] [the C-SPAN Networks'] free speech rights as guaranteed by the First Amendment."[5] We were also among the first of several satellite-delivered programmers to assert a constitutional challenge

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[2] In September of this year we launched "BookTV" as a network-within-a-network. It consists of 48 hours of book-related programming and is available on C-SPAN2 each weekend from Saturday morning to Monday morning.

[3] C-SPAN is available in over 73 million households. C-SPAN 2 is available in over 51 million households. C-SPAN Extra is available to over 800,000 homes and offices, many of which are located in the Washington, D.C. area.

[4] *Cable Television Regulation:* Hearings Before the Subcommittee on Telecommunications and Finance, House of Representatives, 102nd Congress, 1st Session, Serial No. 102-86 at 906.

[5] *See:* Comments of NCSC in MM Docket No. 92-259 (1992).

to the rule in federal court.[6] And again in 1996 as the Commission began to write rules for the evolution to the digital television era, we objected that a *digital* must carry rule "would further infringe C-SPAN's First Amendment rights and would disserve the public interest."[7]

Most recently on July 8th of this year, NCSC's Lamb appeared once again before Congress to repeat our objection to the idea of a must carry rule for digital television and to warn of its consequences for both the C-SPAN Networks and their audiences. He told Sen. John McCain's Senate Committee on Commerce, Science and Transportation,

> Not only will it [a digital must carry rule] cut off millions of more Americans from direct access to the Senate and House debates and our event coverage, it will continue the erosion of our First Amendment rights that began with the 1992 Cable Act. A digital must carry rule will solidify our position among a whole class of programmers who must stand second in line to every holder of a broadcast license in every community in the country.[8]

Now we come before the Commission again in this proceeding to make the same case: that the essence of the must carry rule in all its forms is abhorrent. Whether it is a rule for analog or digital technology does not make a difference. In either form it treads on our First Amendment rights, and it denies millions of Americans access to public affairs programming that does not exist anywhere else on television -- broadcast or cable.[9] In so doing, it constitutes a giant step backward for the public interest.

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[6] We were a co-plaintiff in the litigation that led to the Supreme Court's decisions in *Turner Broadcasting Systems, Inc., v. FCC*, 512 U.S. 622 (1994) (*Turner I*), and *Turner Broadcasting Systems, Inc. v. FCC*, 117 S.Ct. 1174 (1997) (*Turner II*).

[7] *See:* Comments of C-SPAN and C-SPAN2 in MM Docket No. 87-268 (1996).

[8] Mr. Lamb's Senate testimony is attached to these Comments as Exhibit A.

[9] The C-SPAN Networks are devoted exclusively to national public affairs with a strong emphasis on the coverage of public events without editing, commentary, editorials, or commercial sponsorship of any kind. There is no other such national programming available to television viewers.

We acknowledge, however, that analog must carry is current law by virtue of a closely divided ruling of the Supreme Court. Accordingly, these Comments offer our perspective as a satellite-delivered programmer on the infirmities of a possible digital must carry rule rather than on those of its analog equivalent. Although our discussion here focuses on the foreseeable harm to the C-SPAN Networks, our objections are broader and encompass many other issues including those raised by the National Cable Television Association, the industry's principal trade association, whose comments in this proceeding we endorse.

II. ANY FORM OF A DIGITAL MUST CARRY OBLIGATION WILL CAUSE MILLIONS OF AMERICAN HOUSEHOLDS TO LOSE ACCESS TO ALL OR PART OF OUR PUBLIC SERVICE PROGRAMMING. THIS HARM IS CERTAIN -- AS HISTORY HAS SHOWN AND AS PROBABILITY MODELS PREDICT.

A. Our Already Bad Experience With Analog Must Carry Points to Much Greater Harm Under a Digital Must Carry Regime.

Despite the broad sweep of the must carry obligation contained in the 1992 Cable Act,[10] its effect on programmers such as the C-SPAN Networks was mitigated by the fact that cable operators were already carrying over 90% of local over-the-air broadcast stations in response to consumer demand. As a result, relatively few cable channels on a system-by-system basis had to be handed over,[11] and those that were tended to go to stations that were marginal in some way; *i.e.*, a second PBS affiliate, an all-day shopping station, or a station that was deemed "local" under the rule but nevertheless did not command a significant

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[10] 47 U.S.C. Sec. 534 (Local Commercial Television Signals); and 47 U.S.C. Sec. 535 (Noncommercial Educational Television Signals).

[11] *Turner II*, 117 S.Ct. at 1198.

audience in the cable system's market.

Nevertheless, the cumulative effect of the analog must carry rule on the C-SPAN Networks was that over 3.5 million households lost access to all or a part our public service programming.[12] Today, even after 5 years of effort by the cable industry to restore that lost carriage, over 1.5 million households remain with less access to our programming than they had before the 1992 Cable Act became effective.[13]

The displacement of satellite-delivered programmers caused by a digital must carry rule would be several orders of magnitude worse than that caused by analog must carry. The arithmetic is as devastating as it is simple.

For example, a typical channel-locked[14] system under the analog must carry rule may have been required to add only one or two "marginal" broadcast stations (*e.g.*, a second PBS affiliate and a second independent station) to the six broadcast stations it was already carrying (*e.g.*, four network affiliates, an independent station and a PBS affiliate), for a total of seven or eight "must carries." Under a digital must carry regime, every incumbent broadcast station *and* its companion digital station would be given a cable channel, thereby increasing the system's total must carry obligation to fourteen or sixteen channels. In other

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[12] This figure does *not* include the more than 1.5 million households that lost access to one or the other of the C-SPAN Networks as a direct result of the effects of the Cable Act's retransmission consent provision.

[13] A list of the communities where full carriage of C-SPAN or C-SPAN2 has not yet been restored is contained as an addendum to Brian Lamb's testimony before the Senate Communications Subcommittee, which is attached to these Comments as Exhibit A.

The public statements of the NAB about C-SPAN's carriage losses notwithstanding, the combined carriage losses resulting directly from *all* provisions of the Cable Act were felt in nearly 10 million households.

[14] As noted in the *Notice* at paragraph 45, some two-thirds of cable systems are channel-locked, meaning they are unable to add any new programming services (including digital broadcast stations) without bumping an incumbent programmer.

words, under digital must carry the channel-locked system would have to displace considerably more programmer speakers than it did the first time around.[15] The harm to protected speech would be far more severe than the harm of analog must carry tolerated by the Supreme Court in *Turner II*.[16]

B. Our Fear of Harm is Not Mere Speculation: An Independent Probability Model Projects that a Second Cable Channel Given to Broadcasters Means the C-SPAN Networks Will Reach Millions *Fewer* Americans.

In an effort to provide credible evidence of our claims that the C-SPAN Networks would suffer significant and concrete harm from the imposition of a digital must carry rule during the transition to digital television, we commissioned an independent research study by Economists Incorporated of Washington, D.C. to estimate the likely effect of such a rule on our carriage (the "E.I. Study").[17] The study is attached to these Comments as Exhibit B. Even allowing for the inherent limitations of such studies, the E.I. Study and others like it have useful predictive value for policymakers, as persuasively demonstrated by the reliance of Congress and the courts on such studies to justify the analog must carry rule.

The E.I. Study constructs a probability model that estimates the effect of observable data on cable operators' decisions to carry or not to carry the C-SPAN Networks. The data used in the analysis include demographics, market size, system size, and system channel

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[15] The one-third cap on the number of channels reserved for must carry stations does not significantly limit this effect in this system, nor in most. As noted in the text of these Comments at note 22, cable systems carry a median of only seven broadcast stations, yet the average cable system capacity is 61 channels, yielding up to 20 channels, on average, that must be reserved for must carry stations. [*See: Cable Networks:* NCTA, Cable Television Developments, Spring 1998, p. 6.]

[16] 117 S. Ct. at 1198.

[17] *A Probability Model of the Effects of Digital Must Carry Rules on the C-SPAN Networks*, Mercurio, Matthew G., Economists Incorporated, Washington, D.C., October 8, 1998 (hereafter, *E.I. Study*).

capacity, among others.[18] By isolating the marginal effect of channel capacity from the other variables, concrete predictions can be made regarding the effect of a digital must carry rule. The result is expressed as the number of systems and the number of subscribing households that would be denied *all* access to either C-SPAN or C-SPAN2 for each channel "lost" to digital must carry.

The results are summarized in Table 6, "Likely Effects of Proposed Must Carry Rules on the C-SPAN Networks."[19] For example, if every system were to "lose" only 1 channel to a new digital broadcast station, C-SPAN is projected to be dropped from 60 systems serving 240,161 households. C-SPAN2 is projected to be dropped from 53 systems serving 664,300 households.[20]

A fair calculation of the total loss of C-SPAN and C-SPAN2 carriage would factor in the total number of channels cable systems would likely "lose" under a full digital must carry regime. According to the E.I. Study, "almost 70% of the systems used in the final analyses carry 6 or more broadcast signals. Almost 14% carry greater than 10 broadcast signals."[21] The median number of broadcast stations carried by cable systems is 7.[22] Under a digital must carry rule, each of those 7 stations would be entitled to a second cable channel, thereby

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[18] In statistical parlance, these data represent independent variables; the decision to carry C-SPAN or C-SPAN2 represents the dependent variable.

[19] *E.I. Study* at 19.

[20] The number of households losing C-SPAN2 would be greater than those losing C-SPAN2 because C-SPAN2 tends to be carried on systems with higher subscriber levels.

[21] *E.I. Study* at 18.

[22] The median number of channels is used because it is a more realistic measure of the ultimate digital must carry obligation. The mean number channels, although a greater number, is rejected as a nondiscrete number (7.27 channels), and thus less useful as a descriptor of reality.

approximating a fair statement of the projected burden of the rule on all cable systems.

Accordingly, if digital must carry were to be imposed on cable operators C-SPAN would be dropped from approximately 1.68 million households; C-SPAN2 would be dropped from approximately 4.65 million households. The combined loss of C-SPAN and C-SPAN2 would be felt in approximately 6.33 million households.[23]

As extensive as this projected harm may be to the C-SPAN Networks' carriage, it does not take into account the damage done to our ability to reach our audience when cable operators cut back either one or both of the networks to part time carriage. As the E.I. Study indicates, in response to the analog must carry rule cable operators often resorted to part time carriage in an effort to preserve some presence of our public affairs programming on their systems.[24] Although the nature of the data available to E.I. made it infeasible to construct a similar model pertaining to the likely incidence of part time carriage[25] (which it calls "partial" carriage),[26] the E.I. study nevertheless concluded that "there is strong evidence that reductions in effective channel capacity will increase the incidence of partial coverage of both networks *by the same order of magnitude* as the incidence of termination of

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[23] The combined number is an accurate and appropriate measure of the total harm for two reasons. First, as the E.I. Study reports, very few systems dropped both C-SPAN and C-SPAN2 . *E.I. Study*, note 6 at p. 5. Second, in its constitutional analysis in *Turner* the Supreme Court notes each separate instance of the effect of the must carry rule on speech as a distinct interference with speech.

[24] *E.I. Study* at 15. Such part time carriage of either one or both of the C-SPAN Networks is contrary to our carriage policies.

[25] *Id.* at 15, and note 17.

[26] *Id.*

carriage of the two networks" [emphasis supplied].[27] In other words, it is not unreasonable to conclude that digital must carry would lead to a C-SPAN Network being cut back to part time carriage in as many households as it would be dropped entirely.

Accordingly, C-SPAN would face an outright drop or reduction in carriage to 3.3 million households; C-SPAN2 would be similarly affected in 9.3 million households.

III. DIGITAL MUST CARRY IS UNCONSTITUTIONAL. IT VIOLATES THE FIRST AMENDMENT RIGHTS OF THE C-SPAN NETWORKS UNDER *TURNER*.

In *Turner I*, the Supreme Court confirmed that cable programmers "are entitled to the protection of the speech and press provisions of the First Amendment" and that "must carry rules regulate cable speech...[by rendering] it more difficult for cable programmers to compete for carriage on the limited channels remaining."[28] Although the constitutionality of analog must carry was narrowly upheld, the *O'Brien* analysis used in *Turner* would be applied to any digital must carry rule promulgated by the Commission. Under *O'Brien's* intermediate level of scrutiny, a regulation infringing speech must advance a substantial governmental interest and must be narrowly tailored so as not to infringe substantially more speech than necessary to advance that interest. A digital must carry rule would have to pass

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[27] *Id.*, at 19.

[28] 512 U.S. at 636-37.

this test. But it won't.

A. Congress Has Never Stated a Substantial Governmental Interest That Would be Served by Infringing the Speech Rights of Cable Programmers in the Digital Television Context.

The *Turner* Court identified three governmental interests among the Congressional findings contained in the 1992 Cable Act to justify the analog must carry rule's infringement of the speech rights of cable operators and programmers. Those interests included the preservation of the benefits of local broadcasting, public access to multiple sources of information, and fair competition in the television programming market.[29] Both the findings of Congress and the analysis of the Court were focused entirely on an analog-era television industry. None of it translates to the digital era.

There is simply no record established by any entity, much less Congress, that over-the-air broadcasting would be threatened by a failure to have its as yet non-existent digital signals carried by cable systems; nor could there be until there are digital broadcast stations in operation. Even then a threat to local broadcasting would have to be real and substantial -- not merely speculative. Even the broadcast industry acknowledges that the business plans and the transition to digital television are still in their formative stages. To the extent there is any evidence of a threat to broadcasting it is that in a free marketplace, and through retransmission consent negotiations, cable operators and broadcasters can reach agreement without government intervention. And, it is crystal clear that there is *no* basis upon which to base a predictive judgement that absent digital must carry, the benefits of free over-the-air television are jeopardized. "A regulation perfectly reasonable and appropriate in the face of

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[29] *Turner I*, 512 U.S. at 662.

a given problem may be highly capricious if that problem does not exist."[30]

Similarly, no record can be constructed at this time to suggest that the public's access to multiple sources of information would suffer in the absence of a digital must carry rule. In fact, the certain loss of the public affairs information provided by the C-SPAN Networks resulting from digital must carry (as demonstrated above) is evidence of the opposite. Even if digital broadcast stations ultimately were to create new sources of information (which, of course, they have not yet done), there is not, nor could there be any hard evidence that those new sources would dry up without the Government's protection.

The record is also missing that would demonstrate digital must carry is necessary to promote fair competition in the television programming market. The record deemed sufficient by four Justices in *Turner II* on this point is simply irrelevant to a programming market now dramatically altered by the must carry protection and retransmission consent rights granted broadcasters in the 1992 Cable Act, and by the marketplace negotiations to date over digital broadcasting between broadcasters and cable operators.

The point is that not only has the Government not stated a reason justifying digital must carry's burden on speech, it also can not do so, yet, and may well never be able to do so.[31]

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[30] *Turner I,* 114 S.Ct. at 2470, quoting *Home Box Office v. FCC,* 567 F.2d 9, 36 (D.C. Cir. 1977).

[31] In the absence of any Congressional findings that either support or direct the promulgation of a digital must carry rule, the FCC must attempt to make such findings in this proceeding if it wishes to adopt such a rule. Without accepting the Commission's authority to make such "legislative"-type findings, the fact remains that in the absence of any experience with digital television no entity is capable of making any credible findings that would be sustained by the application of the *O'Brien* standard used in *Turner.* And, certainly the deference the Court paid to Congressional findings in its First Amendment calculus in *Turner* is different and greater than any that would be given the Commission here. *Compare, Turner II,* 117 S.Ct. at 1195 ("need not put our imprimatur on Congress' economic theory to validate its judgement.") *with, Quincy Cable TV, Inc. v. FCC,* 768 F.2d 1434 (D.C. Cir. 1985).

B. Digital Must Carry is an Impermissively Broad Obligation -- It Infringes Too Much Speech in the Service of an Unknown Governmental Interest.

The second leg of the *O'Brien* test is that the proposed regulation must be narrowly tailored so that its burden on speech is kept to a minimum. Assuming for a moment that the Government *could* identify a substantial interest protected by digital must carry, the very essence of the proposed rule would preclude its legitimacy. It is a blunderbuss that grants a governmental preference to as-yet-nonexistent programming to the detriment of both established programmers and cable operators. Regardless of the value of the as-yet-nonexistent programming to the public, cable operators would be forced to cede not only channels, but also their editorial right to assemble programming offerings. Cable programmers, in turn, will have fewer channels for which to compete. The certain result is that the C-SPAN Networks and others will lose absolutely *all* of their editorial rights in community after community as they are ejected from individual systems across the country. The cost is too high, and the benefit (if it can even be identified) is too slight to meet the Supreme Court's appropriately stringent test.

The existence of clear alternatives that do not burden speech also undermines the legitimacy of the digital must carry approach. Allowing the public, through the market, to determine the speed at which digital television evolves, or even whether there is a demand for it, is just such an alternative. Such a marketplace solution ought to be given serious consideration before free speech rights are trampled, particularly in light of evidence that the broadcast and cable industries are now engaged in discussions that may well result in that

solution. There may well be other less burdensome alternatives.[32] The mere possibility that such alternatives may exist renders a digital must carry rule illegitimate under First Amendment jurisprudence unless they are first identified, tested and found wanting. But the Government has yet to do those things. No court has tested them, much less found them inadequate to the task of minimizing the burden on speech.

C. The Commission Should Heed the Supreme Court's Recent Guidance on the Danger to Speech Rights When Old Regulatory Schemes Are Applied to New Technologies.

A simple application of the analog must carry rule onto digital television would likely receive a hard look by the Supreme Court, as the post-*Turner* decision in *Denver Area Educational Telecommunications Consortium, Inc., v. FCC*[33] clearly indicates. In that case about the effects of television viewing on children, the Court made key observations about efforts to regulate speech in the midst of evolving technologies. In his majority opinion, for example, Justice Breyer discussed the importance of narrowly tailoring restrictions on speech and of the need to resist the easy application of existing regulatory schemes to that end.[34] He wrote, "aware as we are of the changes taking place in the law, the technology, and the

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[32] We note, for example, the *Notice's* discussion of the availability of input selectors, or A/B switches, and its requests for comment on whether availability of such switches undercuts the need for a digital must carry rule. *Notice*, para. 87-88.

[33] 116 S.Ct. 2374 (1996).

[34] Justice Breyer's views on this First Amendment point are particularly noteworthy in evaluating whether a constitutional digital must carry rule could be crafted. It was Justice Breyer in *Turner II* who provided the necessary fifth vote to sustain the analog must carry rule despite his rejection of the plurality's reliance on the anticompetitive rationale for it. *Turner II*, 117 S.Ct. 1174, at 1204 *(Breyer, J., concurring)*. Justice Breyer nevertheless also recognized that must carry "extracts a serious First Amendment price. It interferes with the protected interests of the cable operators to choose their own programming; it prevents displaced cable program providers from obtaining an audience; and it will sometimes prevent some cable viewers from watching what, in its absence, would have been their preferred set of programs." *Id.* We strongly suspect that if Justice Breyer's calculus from *Turner II* were applied to digital must carry, he would reach an opposite constitutional conclusion from that of the plurality he joined.

industrial structure related to telecommunications [citations omitted], we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now."[35] He then cited *Columbia Broadcasting*[36] to nail down his point: "The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; *solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence*"[37] [emphasis supplied]. In a concurring opinion Justice Stevens also acknowledged the problem: "I am convinced that it would be unwise to take a categorical approach to the resolution of novel First Amendment questions arising in an industry as dynamic as this" [referring to the broadcast/cable industry].[38]

IV. A DIGITAL MUST CARRY RULE UNDERMINES THE PUBLIC's INTEREST IN THE DIVERSE PROGRAMMING CREATED AND DELIVERED BY THE CABLE TELEVISION INDUSTRY.

As delegated by the Congress, the Commission is charged with exercising its regulatory authority to serve the public interest. The dramatic growth of the cable television industry over the last 23 years since the advent of satellite delivered networks is ample proof of the public's continual and continuing demand for more than just clear television reception. The industry's remarkable growth is directly attributable to its ability to provide the public diverse sources of information, entertainment and other services that they could not get

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[35] 116 S.Ct. 2374 (1996)

[36] *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973).

[37] *Id.*

[38] *Id.*

otherwise. Fully 69% of American households now subscribe to cable.[39] Surely, the public's broad acceptance of cable programming ought to be a factor in determining what is and what is not in its own interest.

A digital must carry rule would cause literally millions of Americans to lose access to many of the programming networks they have chosen with their cable subscriptions and would prevent the growth and even the creation of others. As we have already shown, the public would be shortchanged access to the C-SPAN Networks and our unique presentation of long-form coverage of public affairs programs.[40] Other program networks, such as BET and Bravo, and the more recently developed local and regional program services with strong but nevertheless non-mass market appeal, would suffer similarly.[41]

Any imposition of digital must carry would effectively discount nearly a quarter century of the public's interest in cable programming, in favor of something that is essentially still on the drawing board. Digital television holds great promise, and significant progress continues to be made in its development and delivery, but it is still a work in progress. Its technology is by no means matured. Few, if any business plans have been developed. Even public acceptance of the costs of high definition television and the anticipated array of non-video services is uncertain. The promulgation of a rule that denies

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[39] *Kagan's Cable TV Technology,* April 29, 1998, p. 2.

[40] When the analog must carry rule and cable rate regulation became effective the C-SPAN Networks shelved plans for multiplexed services tentatively called C-SPAN3, C-SPAN4 and C-SPAN5. Subsequently, we were able to launch a daytime-only service known as C-SPAN Extra to limited distribution. Digital must carry would certainly end any prospect of further C-SPAN Extra distribution.

[41] According to BET founder Robert Johnson, "Digital must carry means the end of Black Entertainment Television." Quoted at the *"The New FCC: Agenda for the Future,"* a seminar sponsored by the Federal Communications Commission, Federal Communications Bar Association, and Georgetown University Law Center, October 1-2, 1998, Washington, D.C.

the public access to popular and established cable programming it now enjoys and supports would constitute a colossal act of chutzpah that irrationally favors the unknown, the untested and (at least initially) the unaffordable.

V. THE COMMISSION's *NO MUST CARRY* OPTION IS THE ONLY REGULATORY CHOICE THAT IS FAIR, THAT DOES NOT TRAMPLE ON SPEECH RIGHTS, AND THAT SERVES THE PUBLIC INTEREST.

Among the Commission's seven policy options offered up for consideration in the *Notice,* the *No Must Carry* proposal[42] is the only real option now. It is the only practical option that does not in some way create an additional burden on the First Amendment rights of either cable operators or cable programmers by carrying over some form of the must carry obligation into the digital transition period. It also respects the lack of any Congressional authority for imposing the additional burden of lost channels[43] or for so casually transferring the digital must carry obligation into the analog context.

Moreover, the *No Must Carry* option is the regulatory approach that is most consistent with one theme running throughout these Comments: that a competitive programming marketplace free of government interference will be the most efficient and fair means to allocate cable channels, particularly amid such great uncertainty about so many aspects of the digital television market.

VI. CONCLUSION.

For nearly 20 years the C-SPAN Networks have been working in the public interest

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[42] *Notice*, para. 50.

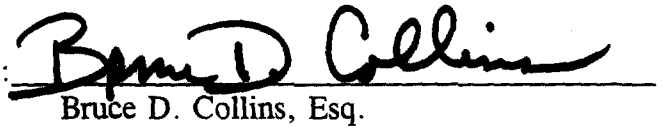
[43] *See:* Comments of NCTA discussion of Section 624(f) of the Communications Act.

from the private sector. Unfortunately, as our history shows, those efforts have frequently been stymied by various forms of govenmental intrusion into the communications marketplace -- including the must carry rule. In this rulemaking the Commission has an opportunity to prevent that from happening again. Simply by doing nothing on digital must carry the Commission will do much. It will demonstrate its respect for our First Amendment rights; and it will finally include the contributions of the C-SPAN Networks (and other cable programmers) in its calculation of the public interest.

We urge the Commission to do nothing ... and to do much on behalf of the Constitution and the public interest. Reject a digital must carry rule.

Respectully submitted,

THE C-SPAN NETWORKS

By: 

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October 13, 1998

Statement of

Brian P. Lamb
Chairman and Chief Executive Officer

of

The C-SPAN Networks

before the

Senate Committee on Commerce, Science, and Transportation

July 8, 1998

Mr. Chairman, and members of the Committee:

I am here to deliver a simple and, I hope, clear message to this Committee and to the Congress: if `must carry' status is granted to digital broadcast signals, the C-SPAN Networks, and most important, the American people who watch the Senate and the House on television, will be harmed.

And, that harm can be avoided simply by letting the free market work in the digital era to let consumers determine which programmers earn a channel on a cable system.

Since 1993 our public service efforts have been, and continue to be, a victim of the must carry rule. They will be victimized once again unless the Congress and the Federal Communications Commission take a deep breath and think through the consequences of applying the old rules to the new digital world.

That is why I am especially grateful that you have asked us to testify now, at this relatively early stage in the process. When the current version of the must carry rule was gaining a legislative foothold, we waited too long to tell our story. By 1991, when I told the House telecommunications subcommittee that the must carry rule would result in millions of Americans losing the ability to watch their own government in action, it was already too late to make a difference. The must carry die had already been cast. Perhaps it will be different this time as your Committee takes an early look at the many issues raised by the move toward digital television.

Unlike in 1991, however, as we sit here in 1998 the C-SPAN Networks bear the scars of the must carry rule. As a direct result of the many provisions of the 1992 Cable Act, C-SPAN and C-SPAN 2 were either dropped entirely or cut back to part time carriage in nearly 10 million households as scarce channel space was taken up by government-imposed preferences for broadcasters and other programmers. Of those nearly 10 million households that lost some or all of the C-SPAN Networks, nearly 5 million suffered that loss as a direct result of the must carry rule and retransmission consent.

For 5 years we expended a lot of energy and a good portion of our non-profit resources to combat the effects of the 1992 Act. Thanks to that hard work and the cable industry's broad commitment to our public service efforts, we were able to restore carriage in many communities. Yet, at the same time we gained subscribers as the industry grew. We added cable system affiliates, and we attracted a wider audience; but there are still over 1 million households across the country with less access to our networks as a result of just the must carry rule

than we had before the 1992 Act.

Six weeks ago I told C-SPAN's must carry story in a letter to the members of this committee, to the House communications committee and to the Congressional leadership. A week later I received a letter from the National Association of Broadcasters that said, in effect, our numbers just don't add up, we really don't have that much to complain about, and, by the way, we ought to be more careful about what we tell Congress. In my view, the NAB and others have missed the point completely.

Let me respond, first, by submitting for the record a list of communities where the harmful effect of the must carry rule and retransmission consent on the availability of C-SPAN or C-SPAN 2 is still being felt today. And, so that the record is complete I also submit my letter of May 22, 1998 to you as well as the NAB response.

Let me respond further by saying that this is not a numbers game. The lawyers and the lobbyists can try to minimize the damage to our public service efforts by citing overall carriage growth, and so forth. But in doing so they miss the fundamental point: there are thousands of real people who watch, vote, write, think and care about their country who continue to have less television access to their government today than before the 1992 Act, no matter how many more subscribers we may have gained since.

My concern is for them and the incalculable number of Americans whom we were denied the chance of ever reaching due to the 1992 Act, and more particularly, due to the must carry rule and retransmission consent.

That concern is deepened by the certainty that we will lose millions more households that now receive our programming, and that we will be prevented from reaching additional households as the cable and broadcast industries enter the digital age -- that is, *if* digital must carry becomes law.

A final response is really in anticipation of those who would have you believe that our complaint is not with a digital must carry rule, but that it is with the cable industry. To them I make these few observations. The cable industry created our networks, even though they were not urged or ordered by the government to do so. Cable operators pay license fees to support our public affairs programs and educational projects because the C-SPAN Networks are good for their customers and good for their country. And they do it on a non-profit basis, without making money for themselves or anybody else. They are providing precisely the kind of programs the government has been nearly begging licensed broadcasters to provide, and the cable operators do it without the governmental sword of a statutory "public service obligation".

Yet, they have been confronted with legislation that has made it very difficult for them to provide us with maximum distribution. Our complaint is that we are at the tail end of a domino effect created by the law. Cable systems are forced to dedicate one channel after another to satisfy national government mandates, even after fulfilling local obligations. By the time a cable operator satisfies the requirements of must carry (including carriage of all-day home shopping stations), retransmission consent, leased access and PEG programming, for example, there are that many fewer channels for C-SPAN, C-SPAN 2 or any other programmer,

regardless of the public service benefit to the audience, or even commercial benefit to the cable operator. On top of that, the rate regulation provisions of the 1992 Act put the C-SPAN Networks at a decided disadvantage against the many other cable programmers that actually make money for the cable systems that carry them.

Must carry and retransmission consent are closely linked in this set of dominos. They are impossible to separate, particularly when the last domino falls and a cable operator is forced to make a programming decision. In any single case where carriage of C-SPAN or C-SPAN 2 is dropped or cut back, several "plausible" explanations unrelated to must carry or retransmission consent may be offered by outsiders -- and such explanations have been offered, usually to muddy the debate in which we are now engaged. The plain fact is that when the must carry/retransmission consent domino became law, C-SPAN 2's steady growth came to a standstill overnight, and lost any chance of catching up to C-SPAN's much wider distribution.

Clearly, history teaches us that we have good reason to be concerned if must carry status is granted to the digital signals local broadcasters will soon be transmitting. But this time around the harm to the C-SPAN Networks and other programmers is certain to be much greater than that we have experienced so far. Not only will it cut off millions of more Americans from direct access to the Senate and House debates and our event coverage, it will continue the erosion of our First Amendment rights that began with the 1992 Cable Act. A digital must carry rule will solidify our position among a whole class of programmers who must